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Supreme Court of the United States

OCTOBER TERM 1944

JOHN N. PRICE & SONS, a corporation,
Petitioner,

vs.

MARYLAND CASUALTY CO., a corporation,
Respondent.

Petition for Writ of Certiorari and Supporting Brief.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, by its attorney, respectfully shows:

Summary Statement of the Matter Involved.

1. Suit was originally commenced in the above case in the New Jersey Supreme Court and then, upon motion of defendant, the respondent here, removed to the United States District Court in New Jersey.

2. Judgment was rendered for the petitioner (see trial court opinion R. 89 A to 94 A). The reference to the third party complainants does not concern the litigation of the parties here.

3. The respondent appealed to the U. S. Circuit Court of Appeals for the Third Circuit, and that court reversed the judgment (see Opinion, R. pp. 108-110).

4. Johannsen Co., a corporation was a general con-

tractor engaged in the construction of a school; petitioner was a subcontractor under the Johannsen Co. Respondent posted a bond for \$471,800.00 (App. pp. 102-104) conditioned, among other things, to pay all claims of subcontractors, in accord with New Jersey law, Revised Statutes of New Jersey 2:60-207. When the job was substantially completed, Johannsen applied to the Board of Education for the final payment, which was about \$30,000. The Board requested that he furnish releases from all of his subcontractors.

Petitioner, at this time was an unpaid subcontractor to the extent of \$4,100.00. Johannsen received a general release from Price under the following arrangement, to wit, Johannsen gave Price a postdated check and also an agreement in writing, agreeing to hold the release in escrow until Price was paid (R. Ex. P-5, p. 104). Johannsen, in violation of the escrow agreement, delivered the release with other releases of other subcontractors to the Board of Education and received his final payment, and then stopped payment on the check issued to Price.

Before the release was delivered to the Board of Education, Price advised the Board of the circumstances under which his particular release was signed and was assured that he would be protected (R. p. 28 A and 29 A).

Price sued the Maryland Casualty Co. on the bond and the trial court found that the release was obtained by fraud and deceit (App. p. 93 A); that the surety stands in no better position than its principal; (p. 94 A) that the surety was not prejudiced by the misuse of the release; and rendered judgment for plaintiff.

5. The United States Circuit Court of Appeals for the Third Circuit, reversed the judgment. In its opinion (App. pp. 108-110), it relies upon the case of *Brooks-Wright v. Maryland Casualty Co.* where the highest court in New Jersey, in reviewing the case of another subcontractor, who delivered a release in somewhat different circumstances, decided that the surety was not liable.

6. The United States Circuit Court of Appeals did

not mention the distinguishing features of the two cases; in its opinion, it failed to mention the fact that the Board of Education knew that Price delivered the release in escrow and was unpaid; (this was not the fact in the *Brooks-Wright* case. See opinion of trial court in that case, reported in 133 N. J. Eq. 15; or 29 Atlantic [2nd] 882). In the *Brooks-Wright* case, the release was handed to Price for delivery to the Board of Education.

In the case here, the following facts appeared, which were not in the evidence in the *Brooks'* case:

- (a) a finding of fraud in securing the release
- (b) a misuse of the release
- (c) knowledge of the fact that release was misused and did not represent payment
- (d) by the contract, no payment could operate to release the surety (R. p. 4A; last sentence of paragraph 19).

Date of Judgment to be Reviewed.

7. The date of the entry of judgment was January 12, 1945, and the petition for this writ, supporting brief and certified record are filed within ninety days next after final judgment in accordance with U. S. Code Title 28, Sec. 350.

The Questions Presented.

8. (a) A contractor is indebted to a subcontractor. By means of fraud and deceit, he obtains a general release, in escrow, without paying the debt. Can a surety who guaranteed payment of the debt urge the release in bar of the claim?

8. (b) The Circuit Court, in reversing a judgment of the District Court, applies the rule of local law; if, in a given case the facts are so materially different so that it becomes self-evident that the local law applied by the Circuit Court is not applicable to the case at bar. Should

this Court invoke its jurisdiction if it is demonstrated that the local law applied properly to the facts, should have resulted in an affirmance by the Circuit Court; especially so, where an injustice would be done to the petitioner and the matter involved is an important question of local law.

Statement of Jurisdiction.

Reasons Relied on for Writ.

9. a. Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the act of February 13, 1925: U. S. Code Title 28, Sec. 347 (a).

b. This Court should grant the writ under its broad discretionary powers in order to prevent an injustice.

c. The Circuit Court grounds its opinion upon the fact that it was bound to follow the law of the State of New Jersey, and then determined that the law as enunciated in the *Brooks-Wright* case controlled the issue here, and, therefore, reversed the judgment of the District Court.

It is respectfully urged (a) that the *Brooks-Wright* decision is not the law of this case; (b) that the Circuit Court decision is in conflict with the law of New Jersey; (c) that the Circuit Court erred in its review of the facts in the case at bar; (d) that the local law properly applied to the facts here justify a ruling in favor of the petitioner.

WHEREFORE, petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN N. PRICE & SONS,

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